



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)
) CASE NO. CR13-5357-CVB
Plaintiff,)
)
v.) ORDER RE: DEFENSES OF
) NECESSITY AND JUSTIFICATION
WILLIAM J. BICHSEL, et al.,)
)
Defendants.)
_____)

This matter relates to defendants’ March 4, 2013 arrest and citation for entry upon a military installation for a purpose prohibited by law or regulation, in violation of 18 U.S.C. §§ 7 and 1382. Defendants were taking part in a protest, at Naval Base Kitsap – Bangor, seeking the disarmament of nuclear weapons. They were arrested after crossing a “blue enforcement line” marking the point at which Navy security personnel typically enforce their right to exclude unauthorized persons from entering the base. (*See* Dkt. 17 at 2.)

Defendants filed a trial brief reflecting their intent to seek defenses of necessity and justification under international law. (Dkt. 18.) The Court construes this filing as a motion to

01 permit testimony. Having now considered that motion, and for the reasons described below,
02 the Court finds no basis for granting the request.

03 Defendants assert that nuclear warheads are illegal under international and national law,
04 including treaties signed by the United States, and argue that the Supremacy Clause of the
05 United States Constitution requires this Court to allow them to present a defense under
06 international law. They maintain a moral responsibility to begin disarmament and make the
07 danger of nuclear weapons known. Defendants also seek to present a necessity defense,
08 arguing it is now allowed given a new understanding of “imminent harm” as addressed in
09 Department of Justice guidelines, and as supported by recent decisions of the United States
10 Supreme Court. Defendants point to the changing opinions of various military, political, and
11 religious leaders as to nuclear weapons, and cite a study as supporting their reasonable belief as
12 to a direct causal relationship between their actions and averting harm.

13 Defendants fail to provide any support for a defense based on international law. In
14 fact, this argument, in a case involving some of the same defendants named in the current
15 matter, has been rejected by the Ninth Circuit Court of Appeals. *United States v. Kelly*, 676
16 F.3d 912, 917 n.2 (9th Cir. 2012) (rejecting contention that district court improperly excluded
17 international law defense: “Because the Hague Convention does not supersede the statutes
18 criminalizing appellants’ conduct, there was no ‘international law defense’ for the jury to
19 consider.”)

20 Defendants likewise fail to provide any basis for allowing a defense of necessity. A
21 court may preclude a defense of necessity where “‘the evidence, as described in the defendant’s
22 offer of proof, is insufficient as a matter of law to support the proffered defense.’” *United States*

01 *v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1992) (quoting *United States v. Dorrell*, 758 F.2d 427,
02 430 (9th Cir. 1985)). To invoke the necessity defense, defendants must make a colorable
03 showing that: “(1) they were faced with a choice of evils and chose the lesser evil; (2) they
04 acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship
05 between their conduct and the harm to be averted; and (4) they had no legal alternatives to
06 violating the law.” *Id.* (citing *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989)).

07 As conceded by defendants, federal courts have consistently precluded political
08 protesters, including nuclear weapon activists, from utilizing a necessity defense. *See, e.g.,*
09 *United States v. Kelly*, No. CR10-5586-BHS, 2010 U.S. Dist. LEXIS 123514 at *7 (W.D.
10 Wash. Nov. 22, 2010) (“In political protest cases, as is the case here, the Ninth Circuit
11 consistently upholds the exclusion of the necessity defense.”) (citing *Dorrell*, 758 F.2d at
12 431-434, and *United states v. May*, 622 F.2d 1000 (9th Cir. 1980)). Indeed, in *Kelly*, this Court
13 concluded the defendants failed to set forth the elements of a necessity defense in similar
14 circumstances:

15 . . . Defendants entered the Bangor Naval base, admittedly to symbolically
16 disarm Trident warheads. Defendants, like those in *May*, have not established
17 evidence that could support a reasonable belief that such action would result in
18 the [elimination of the] Trident program, alter the United States defense
19 strategy, or have cause[d] any reduction in the risk of nuclear war. Defendants
20 have not established the existence of imminent harm at the time they attempted
21 to symbolically disarm nuclear weapons kept at the Bangor base. Defendants
22 also have not established that legal alternatives were not available to them.

20 2010 U.S. Dist. LEXIS 123514 at *7-8.

21 Defendants fail to support their contention that the understanding of a showing of
22 imminent harm in a necessity defense has changed. Indeed, the documents and case law relied

01 upon – including a “White Paper” issued by the Department of Justice regarding the use of
02 lethal force against United States citizens and Supreme Court decisions addressing affirmative
03 action or voting rights (*see* Dkt. 18 at 5-6) – are plainly inapposite. Likewise, a study showing
04 greater success of nonviolent, as compared to violent movements (*see id.* at 6-7) does not
05 suffice to demonstrate the causal relationship required for a showing of necessity in considering
06 the facts of this case.

07 Defendants, in sum, fail to set forth a colorable showing of the elements required for a
08 necessity defense. A defense of necessity is not appropriate given the lack of the requisite
09 immediacy of harm, the fact that defendants cannot be said to have reasonably anticipated their
10 actions would result in furthering their cause of nuclear disarmament, and because other legal
11 alternatives existed – including defendants’ ability to conduct their protest behind the blue
12 enforcement line.

13 The Court finds no basis for a defense either under international law or based on
14 necessity. Accordingly, defendants’ construed motion to permit testimony (Dkt. 18) is
15 DENIED.

16 DATED this 17th day of October 2013.

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19 Mary Alice Theiler
20 Chief United States Magistrate Judge
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